88-837

Supreme Court, U.S.
FILED
NOV 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

* *

HERMAN T. MULVEHILL, SR.,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* *

BRIEF OF PETITIONER

* *

J. LOUIS WILKINSON
VIRGINIA A. VINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4959

No._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

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HERMAN T. MULVEHILL, SR.,

Petitioner

vs.

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PETITION FOR A WRIT OF
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BRIEF OF PETITIONER

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J. LOUIS WILKINSON
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(205) 252-4959

PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein, and Herman T. Mulvehill, Sr., who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Blount County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction was without a written opinion.

A copy of the same is submitted in Appendix "A" to this petition.

The denial of the Petitioner's Application for Rehearing by the Court of Criminal Appeals of Alabama was without a written opinion.

A copy of the same is submitted in Appendix "B" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari was without written opinion.

A copy of the same is submitted in Appendix "C" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on September 23, 1988, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in Petitioner's writ is the Fourteenth Amendment to the Constitution of the United States. A copy of this amendment is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

Under indictment filed in the 30th Judicial Circuit of Alabama, on the 6th day of April, 1982, Herman Travis Mulvehill was charged in Count I with knowingly obtaining or exerting unauthorized control over coal, the property of Helen Nice Moss, of the value of $112,000.00, with the intent to deprive the owner of said property in violation of Section 13A-8-3 of the Code of Alabama, and in Count II with knowingly obtaining or exerting unauthorized control over coal, the property of Helen Nice Moss, of the value in excess of $1,000.00, with the intent to deprive the owner of said property, in violation of Section 13A-8-3 of the Code of Alabama.

The case came on for trial on May 21, 1984, on the Defendant's plea of "Not Guilty" and on May 30, 1984, the jury returned a verdict of "Guilty of Theft in the First Degree". On July 3, 1984, the court, after objections to the pre-sentence report, and the appearance of several hundred citizens submitting a petition signed by some 800 citizens in behalf of the Defendant, entered a finding of guilty of theft in the first degree and sentenced the Defendant to serve fifteen years in the State penitentiary. The Defendant was continued on bond pending determination of a Motion for a New Trial. On July 10, 1984, a written Motion for New Trial was filed and on August 3, 1984, a Motion for a Judgment of Aquittal was filed. On September 14, 1984, the court denied the Motion for Judgment of Aquittal and denied the Motion

for New Trial. The Defendant in open court gave notice of appeal and was continued on bond in the amount of $10,000.00.

On the 12th day of April, 1988, the Court of Criminal Appeals of Alabama affirmed by order without opinion.

On the 10th day of May, 1988, the Court of Criminal Appeals denied his Application for Rehearing without opinion, and on the 23rd day of September, 1988, the Supreme Court of Alabama denied the Petition for Writ of Certiorari without opinion.

ARGUMENT

It is the fundamental precept of American Jurisprudence that the prosecution in a criminal case is disallowed to resort to any kind of evidence of a defendant's evil character to establish a probability of his guilt, not because the law invests the defendant with a presumption of good character (Greer vs. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L. ed 469), but because it simply closes the whole matter of character disposition and reputation on the prosecution's case-in-chief. The leading case on the proper use of character evidence by a defendant is still Michelson vs. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L. ed 168 (1948).

Of course, it follows as a necessary corollary to Greer, supra, that the prosecution cannot attack the character of the accused in rebuttal testimony unless he first puts it into evidence.

If the prosecution should flagrantly violate this most basic principal in a state action, then an accused has a valid claim before this Court because of the protection afforded him by the due process clause of the Fourteenth Amendment to the United States Constitution. This fact was implicitly recognized in United States Ex Rel Hurley vs. State of Delaware, 365 F.Supp. 282 (1973).

The "bad man/good man" dichotomy has been categorically rejected by all of the courts once it is recognized. The primary question is always whether or not the prosecution is attempting to prejudice a jury by improperly adducing evidence of

character when it is not properly an issue and thus lacks any probative value and only tends to stigmatize the accused as a "bad man". See United States vs. Fox, 473 F.2d 131 (D.C. Cir. 1972); United States vs. Wright, 489 F.2d 1181 (D.C. Cir. 1973); and United States vs. Giese, 597 F.2d 1170 (9th Cir. 1979).

In Michelson, supra, Mr. Justice Jackson wrote to the effect that the state may not show a defendant's bad name among his neighbors, not because character is irrelevent, but it weighs too much with the jury and over-persuades them to prejudice the accused. To allow such evidence, Mr. Justice Jackson felt it would lead to confusion of the issue, unfair surprise and undue prejudice. Only the defendant may open up this line of inquiry if he chooses to do so.

The instant case was a veritable travesty when measured against the safeguard which this court has, without exception, adhered to.

During the entire trial, the Defendant had never, in any way, opened up the issue of his character. Following the testimony of the accused, the State of Alabama called an FBI agent to the stand and proceeded (over vigorous, repeated, and prompt objections by trial counsel) to question him as to the general reputation of the Defendant in the community where he lived and worked, and for <u>how long</u> he had known that reputation in the community. (R. 1098,1099) To further exacerbate the situation, the trial judge even refused Defendant's trial counsel's request for curative instruction to the jury to the effect that they should completely eliminate from their minds the appearance of an FBI agent in such a capacity.

No testimony on any factual issue was sought from the FBI agent. His presence before the jury as a witness was obviously for the sole and avowed purpose of destroying Defendant's credibility and was unduly prolonged by objectionable and repetitive questioning by the Special Prosecutor. This was allowed to continued by the court, by never produced any evidence from the FBI except the presence of an FBI agent which in itself said the FBI knew bad things about the Defendant and, undoubtedly, indelibly poisoned the minds of the jurors conerning the character and reputation of the Defendant, Herman Mulvehill. The witness was never predicated or qualified to give character or reputation testimony and was excused from the stand without having any testimony whatsoever. The Defendant's character and general reputation was included in each of the many questions asked

by the Special Prosecutor to which Defendant's objections were sustained. The procedure occasioned lengthy questioning and discussions between the court and counsel before the jury, and recesses, before the court finally suggested an end.

The Defendant objected to the procedure and the court should have terminated the inquiry long before it did.

Legal minds know that technically the episode meant nothing was presented that could be considered. But who is naive enough to believe this was the effect on the minds of the jurors. Their minds were poisoned against the Defendant by thoughts that the State brought an agent to tell an FBI story about a criminal on trial before them which they were only prevented from hearing because that "criminal" objected. The Defendant's objections only served to put him in a more unfavorable light. The framing of the questions by the State

suggests to the legal mind a designed unwillingness to ask the simple questions required for a predicate and through the process of "invited objection" repeatedly pose questions which would inject into the minds of the jurors the words "bad reputation" without ever laying a proper predicate for testimony from the witness.

The members of this Court can surely sense and feel an awareness of the rising tension and prejudicial aura that increased with each of the nine times substantially the same questions was asked and the same objection sustained. In the midst of it all the State found requests for recesses necessary to further consider with the court the posture of the situation, all the while counsel for the Defendant was trying to bring it to an end. Meanwhile, the jurors had extended periods with nothing to do but dwell upon what kind of a person the Defendant was that the FBI was here about.

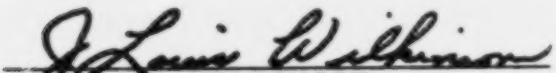
Upon resuming before the jury, the State found it necessary, over Defendant's overruled objections, to repeat the initial questions asking for the FBI agent's name, his employment as an FBI agent, and that he had known the Defendant for several years.

It is not coincidence that the State did not seek to produce any other character or reputation testimony. It is the position of the Defendant that the FBI agent and the manner in which the situation was allowed to develop before the jury created extreme prejudice against the Defendant and planted prejudicial thoughts in the minds of the jurors which were not and could not be removed, that the Defendant was bad. This was accomplished and in no way eradicated by the court. The episode was so damaging and prejudicial that it tainted the entire defense, and requires a reversal and a new trial.

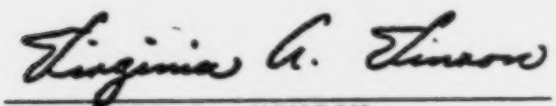
CONCLUSION

The Petitioner submits to this Court that the decision of the Court of Criminal Appeals should be reversed and the case remanded to the trial court.

Respectfully Submitted,



J. LOUIS WILKINSON
Attorney for Petitioner

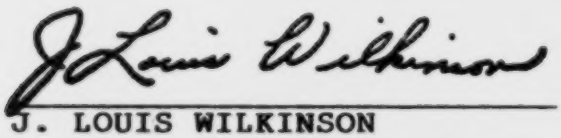


VIRGINIA A. VINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been mailed this date by certified mail to the Honorable Don Siegelman, Attorney General, at his office, 11 South Union, Montgomery, Alabama 36130, properly addressed, first class postage prepaid.

DATED this the 18th day of November, 1988.



J. LOUIS WILKINSON
Attorney for Petitioner
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4959

APPENDIX

APPENDIX A

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

6th Div. 569 Blount Circuit Court
CC82-095

Herman T.Mulvehill, Sr. vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on April 12, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

XXX **Affirmed** on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No Opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

_____

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B-1

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

6th Div. 569 Blount Circuit Court
CC82-095
Herman T. Mulvehill, Sr vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on May 10, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

_____ **Affirmed** on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No Opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

XXX Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

_____

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B-2

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101
November 7, 1988

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

Hon. J. Louis Wilkinson
Hon. Virginia A. Vinson
Attorneys at Law
503 Frank Nelson Building
Birmingham, Alabama 35203

Re: 6 Div. 569
Herman T. Mulvehill, Sr. vs. State
Blount Circuit Court No. CC82-095

Dear Sir:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from September 23, 1988, to allow filing a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is notified by the United States Supreme Court of the filing of said petition in that Court.

Yours very truly,

/s/ Mollie Jordan

Clerk

cc: Clerk, Blount Circuit Court
Office of the Attorney General
File

APPENDIX C

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

September 23, 1988

87-1009

EX PARTE: HERMAN T. MULVEHILL, SR.

PETITION FOR WRIT OF CERTIORARI

(Re: Herman T. Mulvehill, Sr. vs. State)

CCA 6/569

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

HOUSTON, J. - TORBERT, CJ., ALMON and BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.

Witness my hand this 23rd day of September, 1988.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX D

a) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-837

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

HERMAN T. MULVEHILL,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

QUESTIONS PRESENTED

1. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a federal constitutional claim by a state convict which is raised for the first time in this Honorable Court?

2. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a claim by a state convict, which could have been but was not presented to the highest state court in a manner which permitted that court to review the claim?

3. Does a state common law rule of evidence, which allows proof of a criminal defendant's reputation after such defendant has put his character into issue, violate due process?

THE PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Herman T. Mulvehill, Sr., who is Petitioner herein, as Defendant, Appellant and Petitioner, respectively, and the State of Alabama, who is Respondent herein, as Plaintiff, Appellee, and Respondent, respectively.

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NO. 88-837

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

HERMAN T. MULVEHILL,

PETITIONER,

V.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION
TO THE PETITION

OPINIONS BELOW

The Alabama Appellate courts issued no opinions in the Petitioner's cases. The Courts' orders affirming the convictions, denying rehearing and denying certiorari are or will be reported in tables as follows:

Mulvehill v. State, 531 So.2d 69 (Ala. Crim. App, 1988)

Ex parte Mulvehill, __ So.2d __ (Ala, Sept. 23, 1988)

JURISDICTION

The petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making an alleged claim under the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in this cause.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Herman Travis Mulvehill, Sr., was indicted for two separate instances of theft of property in the first degree[1] by the grand jury of Blount County, Alabama, at its April, 1982, term. (R.pp.Cr.15-16) On September 9, 1982, the Petitioner was arraigned on the indictment and pleaded not guilty. (R.p.Cr.4)

Numerous motions were filed and ruled on prior to trial. (R.pp.Cr.4-9)

On May 21, 1984, the cause came on for trial before Honorable H. E. Holladay, a Circuit Judge, and a jury. The Petitioner was attended by his attorney, Honorable Charles Howard, Jr., and the State was represented by its District Attorney, Honorable Fitzhugh A. Burttram, and Honorable Robert Morrow, Special Prosecutor. (R.p.1)

---

1. Section 13A-8-3, Code of Alabama, 1975.

After the State rested, the Petitioner testified in his own behalf. (Tr.pp.942-1088)

In rebuttal, the State attempted to prove the Petitioner's reputation for truth and veracity. However, the Prosecutor was not able to lay a predicate acceptable to the Honorable trial judge, and the evidence could not be introduced. (Tr.pp.1089-1101)

On May 30, 1984, the jury returned a verdict finding the Petitioner guilty as charged. (R.pp.Cr.1 and 9-10)

The Petitioner was adjudged guilty in accordance with the verdict on may 30, 1984, and on July 3, 1984, the Petitioner was sentenced to fifteen years imprisonment.[2] (R.pp.Cr.1-2 and 10)

The Petitioner moved for a new trial on July 10, 1984, but the same was overruled on September 4, 1984. (R.pp.Cr.12-14)

---

2. Sections 13A-5-6(a)(2) and 13A-8-3(c), Code of Alabama 1975.

Appeal was taken to the Court of Criminal Appeals of Alabama. (R.p.Cr.14)

The cause was submitted to the Court of Criminal Appeals on, to wit, May 21, 1985. The Petitioner claimed and argued over one hundred alleged reversible errors on the part of the Learned Trial Judge. However, on April 12, 1988, the Court of Criminal Appeals of Alabama affirmed the conviction without opinion. Mulvehill v. State, 531 So.2d 69 (Ala. Crim. App, 1988)

Review of the decisions of the Court of Criminal Appeals of Alabama by the Alabama Supreme Court is by writ of certiorari. On certiorari, the Alabama Supreme Court is bound by the findings of fact made by the Court of Criminal Appeals, unless the Petitioner requested the finding of additional facts, under Rule 39(k) A.R.A.P, appendix, incident to his application for rehearing. Obviously, if the affirmance was without opinion, there is nothing for the Alabama Supreme Court to review, unless the Petitioner requests the

finding of additional facts. Ex parte Hoffman, 493 So.2d 387 (Ala, 1986); Ex parte Grear, 484 So.2d 381, 382 (Ala, 1986)

On April 26, 1988, the Petitioner applied for rehearing in the Court of Criminal Appeals. He did not, however, request the finding of additional facts as provided for by Rule 39(k) A.R.A.P, appendix.[3]

---

3. In the Respondent State's initial reply brief in opposition to the writ in the Alabama Supreme Court, the following observation was made:

> "...Appended to the front of the clear plastic cover of the Application/Brief was a piece of yellow "Post-it" paper on which was handwritten:
>
> '...39(k) handwritten by attorney on original copy of application for rehearing....'
>
> The undersigned, even after inquiry of the Honorable Clerk of the Court of Criminal Appeals, have no idea to what the recitations of this "Post-it" paper refers. However, the Appellant apparently did not request the Court of Criminal Appeals to make specific findings of fact relating to the particular issues of the case, incident to his application for rehearing...." (Respondent's Initial Reply Brief, pages 4-5)

On May 10, 1988, the Court of Criminal Appeals overruled the Petitioner's application without opinion. Mulvehill v. State, above.

On May 28, 1988, the Petitioner petitioned the Alabama Supreme Court for a writ of certiorari to review the action of the Court of Criminal Appeals. The Petitioner raised over one hundred alleged grounds for the writ, including the claim raised in this Honorable Court. However, this claim was argued only generally without reference to the State or Federal Constitution or due process and without citation of authority of any sort.[4]

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4. A review of the tables of authorities in the Petitioner's several briefs in the State Appellate Courts reveals no reference to the Constitution or any federal statute, treaty, law, rule, or regulation and only one reference to a federal judicial opinion. In its initial reply brief in the Alabama Supreme Court, the State criticized the Petitioner for his raising a plethora of alleged claims and, incident thereto, quoted from Jones v. Barnes (463 U.S. 745, 753, 77 L.Ed.2d 987, 994, 103 S.Ct. 2208 [1983]). In his reply brief the Petitioner mentioned Jones in an effort to distinguish it.

In response to the petition the State filed an initial reply brief under Rule 39(f) A.R.A.P, appendix, pointing out that, since the Petitioner had not requested the finding of additional facts incident to his application for rehearing in the Court of Appeals, there were no facts on which to base certiorari review. Ex parte Hoffman, 493 So.2d 387 (Ala, 1986), above; Ex parte Grear, 484 So.2d 381, 382 (Ala, 1986), above. The State also pointed out that the petition was insufficient in form to meet the Alabama Supreme Court's jurisdictional requirements under Rule 39(c)(4) A.R.A.P, appendix.

On September 23, 1988, the Alabama Supreme Court denied the writ, without opinion. Ex parte Mulvehill, ___ So.2d ___ (Ala, Sept. 23, 1988)

ARGUMENT

We see no point in burdening this Honorable Court with extended argument on obvious points.

The Alabama Supreme Court was given no opportunity to consider the due process claim which the Petitioner seeks to raise here. Therefore, cetiorari, under 28 U.S.C. 1257, does not lie to review it. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Rotary International v. Rotary Club, 481 U.S. ___, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987).

The Petitioner made little effort to comply with the requirements of Rule 39 A.R.A.P, appendix. He presented to the Alabama Supreme Court a claim with no facts to support it and utterly failed to comply with Rule 39(c), A.R.A.P. The Alabama Supreme Court would have had no jurisdiction to review the claim the Petitioner raises here, even if he had argued due process. Therefore, the

claim was not presented to the State Supreme Court and certiorari, under 28 U.S.C. 1257, does not lie to review it. Cardinal v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969)

Under the plain words of 28 U.S.C. §1257(3), the State Supreme Court must have had the opportunity to address the federal question on which review is sought here. Where, as here, a state supreme court does not address such an issue, it is presumed that the issue was not properly before that Court. Rotary International v. Rotary Club, 481 U.S. ___, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987); Exxon Corp. v. Eagerton, note 3, 462 U.S. 176, 181, 76 L.Ed.2d 497, 504, 103 S.Ct. 2296 (1983); Hanson v. Denckla, 357 U.S. 235, 244, 2 L.Ed.2d 1283, 1292, 78 S.Ct. 1228 (1958). Slagle v. Ohio, 366 U.S. 259, 264, 6 L.Ed.2d 277, 281, 81 S.Ct. 1076 (1961). However, no such presumption is necessary here, since the Petitioner made no pretense of

presenting a federal claim in state court and hardly a pretence of complying with the Rules of Appellate Procedure.

Addressing the merits briefly, it is obvious that the Petitioner is arguing common evidentiary law based on the assumption that the accused has not put his character into issue. Here, by testifying the Petitioner put his character into issue, and rendered evidence of his reputation relevant and admissible, under both Alabama and federal law. E.g. Anderson v. State, 44 Ala. App. 388, 210 So.2d 436 (1968). Compare Rules 404, 607 and 608, Federal Rules of Evidence. If any error occurred here it was not in the State's offering the evidence but in the Trial Judge's sustaining the defense objections to it.

CONCLUSION

In conclusion, the Respondent respectfully submits that the claim the Petitioner seeks to raise is not properly before the Court and is, in any event, a claim with no basis in fact or law.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

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APPENDIX

RELEVANT ALABAMA COURT RULES

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEALS

(a) Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue,or decision complained of, except that, in the case of a pre-trial appeal by the state in a criminal case, either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of certiorari, with an accompanying brief, shall

be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (2 weeks) after the decision of court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within 7 days (1 week) of the judgment of the court of criminal appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance

with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

(2) From decisions that affect a class of constitutional, state, or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the Supreme Court or the courts of appeal; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court

of appeals, and that part of the prior decision of the Supreme Court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling Supreme Court cases overruled which were followed in the decision of the court of appeals.

(d) Form of Petition. The petition shall be on legal-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based; and,

(4) A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit.

(e) Service. Nine copies of the petition and briefs shall be filed with the clerk of the Supreme Court, one copy with the clerk of the appropriate court of appeals, and one copy shall be served on each party to the proceeding in the court of appeals including those not joining in the petition.

(f) Briefs. Petitioner's brief shall be on the same size paper and bound as briefs for appeals and shall accompany the petition for writ of certiorari. No more briefs will be required of petitioner, although he may file an answering brief within 14 days (2 weeks) --or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receipt of respondent's

brief. Within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case within 7 days (1 week)--after service of the petition and brief by petitioner, the respondent may file an initial brief limited solely to the issue of whether or not any of the grounds set forth in (c) (1)-(5) authorize the granting of a writ. Thereafter, if the writ should be granted, the respondent may file a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of certiorari, within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after notice that the writ has been granted. Nine copies of the reply brief shall be filed with the clerk of the supreme court and one copy shall be served on the petitioner or his attorney. No more shall be required of respondent.

The work "brief" as used in this rule includes an appendix where brief and appendix

were employed by the party in the court of appeals.

(g) Action on Petition. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the clerk of the appropriate court of appeals. The record, one copy of the briefs,and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Oral Argument. There will be no oral argument on preliminary examination. In the event the writ is granted, oral argument may be requested in writing by either party within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receiving notice of the granting of the writ. A copy of

the request shall be served on the adverse party.

(i) Submission. If either party shall have made known a desire for oral argument, the clerk of the supreme court shall endorse that fact on the proper docket and, if oral argument is not determined under the criteria of Rule 34 to be unnecessary, shall set the case down for oral argument not less than 14 days (two weeks) after notifying the parties, or their attorneys or record, in writing of such setting. If neither party shall have requested oral argument,as herein provided, or if the supreme court shall have determined oral argument to be unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case upon the record, briefs, and appendices, if any.

(j) Rehearing. No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied.

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error of defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of petitioner.

RULE 40. APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in case of a pre-trial appeal by the state in a

criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week)after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of December, 1988, I did serve the requisite number of copies of the foregoing on the Attorneys for Herman T. Mulvehill, Sr., Petitioner, by mailing the same to said Attorneys, first class postage prepaid and addressed as follows:

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